

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JEROME GODINEZ**  
Claimant

VS.

**E & E SPECIALTIES, INC.**  
Respondent

AND

**CNA INSURANCE COMPANIES**  
Insurance Carrier

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Docket No. 241,070

## ORDER

Respondent requested Appeals Board review of Administrative Law Judge Brad E. Avery's March 5, 1999, preliminary hearing Order for Compensation.

## ISSUES

The Administrative Law Judge ordered respondent to provide claimant with medical treatment for a right shoulder injury with orthopedic surgeon Kenneth L. Wertzberger, M.D. Further, respondent was ordered to pay temporary total disability compensation to claimant commencing the date of surgery and until claimant is released to return to work.

Respondent contends claimant failed to prove his work activities from December 21, 1998, through December 28, 1998, either caused or permanently aggravated his right shoulder injury. Respondent also contends claimant failed to prove he provided respondent with timely notice of the accident.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

Claimant's testimony and the medical records admitted into evidence at the preliminary hearing established that claimant had bilateral shoulder complaints as early as 1997. Claimant first saw orthopedic surgeon Kenneth L. Wertzberger, M.D., for his bilateral shoulder complaints on January 26, 1998. From a January 17, 1998, MRI examination and Dr. Wertzberger's clinical findings, the doctor found claimant with some thinning of the supraspinatus tendon particularly on the left and an impingement type situation at least on the right. The doctor's clinical examination found the left shoulder worse than the right. Dr. Wertzberger opined that claimant's bilateral shoulder pain appeared to be closely connected to his work.

On February 18, 1998, Dr. Wertzberger performed an arthroscopy, subacromial impingement relief and open distal clavicle resection and repaired claimant's rotator cuff tear of his left shoulder. Although both Dr. Wertzberger and claimant thought the left shoulder injury was related to claimant's work, claimant, for reasons not explained in the record, did not make a workers compensation claim.

Claimant described his work duties as requiring him to run two choppers processing recycled plastic parts weighing from 70 to 150 pounds. Claimant testified his right shoulder symptoms worsened during the alleged period of accident between December 21, 1998, and December 28, 1998. In fact, on December 21, 1998, he notified his employer of his right shoulder problem by filing an accident report.

Thereafter, respondent sent claimant to Lawrence Memorial Hospital where he was examined by Chris D. Fevurly, M.D. His impression was right shoulder impingement and rotator cuff syndrome. Dr. Fevurly did not express an opinion on whether claimant's right shoulder problem was related to his work.

Claimant returned to see Dr. Wertzberger on January 5, 1999. In a letter dated January 5, 1999, Dr. Wertzberger found claimant's right shoulder symptoms to be the same as he had in his left shoulder. He believed claimant right shoulder required the same surgery as was done to correct his left shoulder problem.

Respondent argues that claimant has failed to prove he suffered a right shoulder injury for a date of accident occurring between December 21, 1998, and December 28, 1998. Respondent asserts that claimant's right shoulder injury occurred as early as January 1998. Further, respondent argues there is no evidence in the preliminary hearing record that there was any permanent worsening in claimant's right shoulder injury from January 1998 to December 28, 1998. The only evidence contained in the record that claimant's right shoulder condition worsened was claimant's subjective complaints.

The Appeals Board concludes that the Administrative Law Judge's preliminary Order should be affirmed. The Appeals Board finds that the medical records of Dr. Wertzberger and claimant's testimony prove that claimant's right shoulder injury was either caused by claimant's work activities or was permanently aggravated by his work activities. Where a

worker's job duties aggravate or accelerate an existing condition or disease or intensify a pre-existing condition, the aggravation becomes compensable as a work-related accident. See Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978). Respondent seems to argue that since claimant did not make a claim for a previous work-related left shoulder injury, he can not now have a valid claim for a right shoulder injury. The Appeals Board disagrees.

In regard to timely notice of accident, the Appeals Board finds, through claimant's testimony and the exhibits admitted into evidence at the preliminary hearing, claimant has proved that he notified the respondent of the right shoulder injury within 10 days of the accident.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order for Compensation entered by Administrative Law Judge Brad E. Avery dated March 5, 1999, should be, and is hereby, affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 1999.

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BOARD MEMBER

c: Eugene C. Riling, Lawrence, KS  
Gary R. Terrill, Overland Park, KS  
Brad E. Avery, Administrative Law Judge  
Philip S. Harness, Director